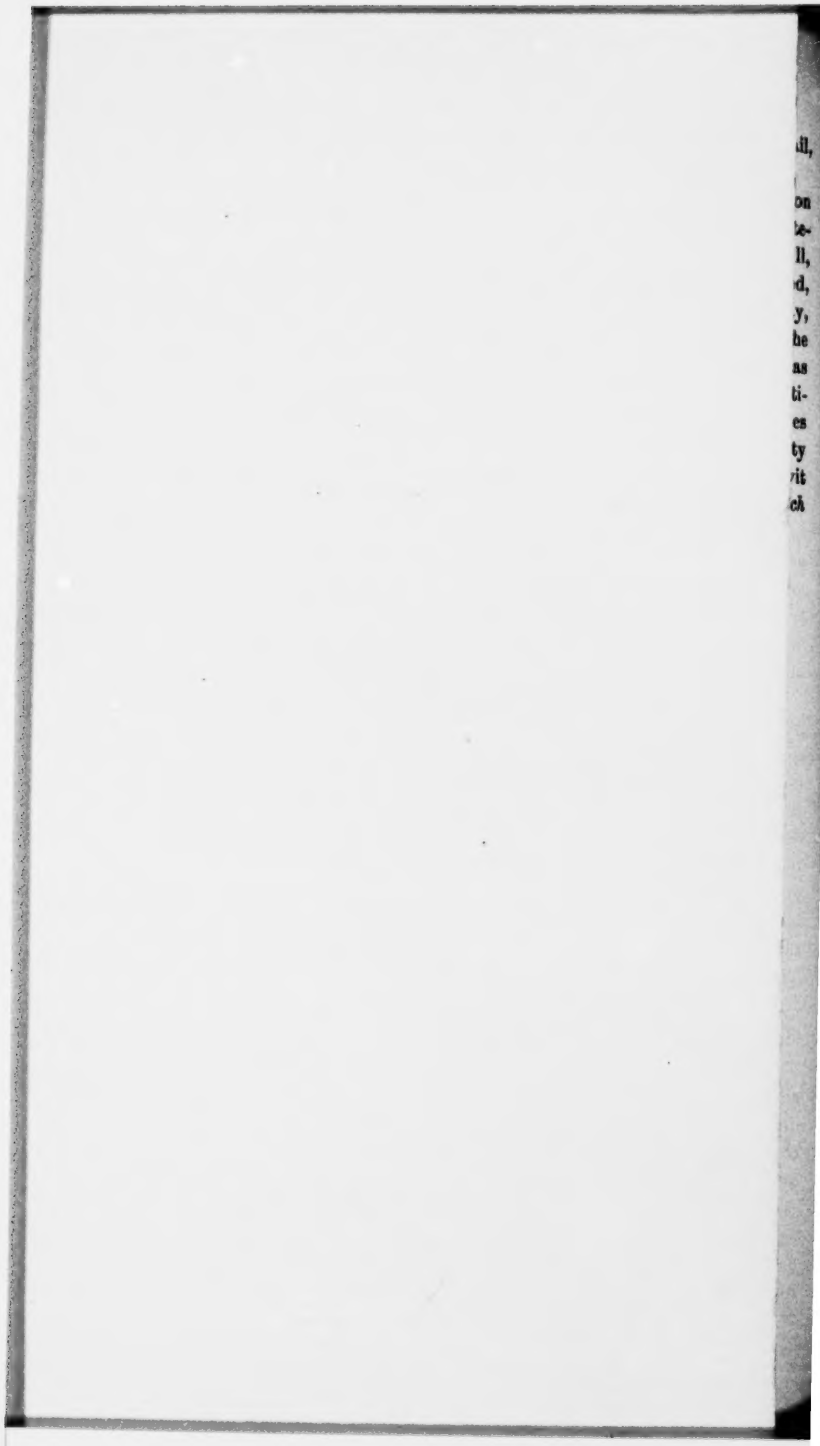

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Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed Oct. 24, 1900.

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WILLIAM B. TYLER, PLAINTIFF IN ERROR,

vs.

THE JUDGES OF THE COURT OF REGISTRATION.

SUPPLEMENTAL BRIEF FOR THE DEFENDANTS IN ERROR.

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(17,656.)

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IN THE

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THE JUDGES OF THE COURT OF REGISTRATION, DEFENDANTS IN ERROR.

SUPPLEMENTAL BRIEF FOR THE DEFENDANTS IN ERROR.

The defendants in error, with the permission of the court, beg to submit the following brief in reply to the brief of the plaintiff in error:

I.

There are certain inaccuracies in the brief for the plaintiff in error which the defendants in error deem it important to call to the attention of the court; for it is upon these inaccuracies that the plaintiff in error bases a material portion of his argument.

(*a.*) He assumes that under the Massachusetts Act there is no real judicial proceeding; that nothing comes before the court but the *ex parte* statements of the applicant, and the mere opinion of the examiner that the title is or is not proper for registration, unaccompanied by any statement of facts, abstract of title, or other evidence.

The plaintiff in error, not finding the familiar conveyancing term "abstract" in the Land Registration Act, and misconstruing the equivalent expression "report," states as a fact (page 24 of his brief) that under the Act and *in the present case*—

"The examiner * * * reports to the court, not the details of his examination, but only his opinion upon the result. In the present case he merely found the title of record to be good." * * *

"There is no abstract of title or indication of any details relating to it, by which the accuracy of his examination may be verified, or by which the correctness of his opinion may be judged. * * * There is no real trial and nothing comes before the judge, except what is stated in the application, and in the opinion of the examiner, *and the decree is pronounced upon that alone.* The examiner thus becomes the real judge, and the only security for the protection of adverse interests."

And on page 25:

"The judge acts only upon what is laid before him, and without knowledge of the facts, and without having the question brought to his attention."

This is absolutely inaccurate. It is not in accord with the requirements of the statute, the general practice, or the facts in this case. The act calls for the filing by the examiner of his *report*, "concluding with his opinion upon the title." This "report" is what conveyancers call an "abstract of

title." It is a full abstract of the entire record title, and it concludes with the examiner's opinion. As a matter of fact, such abstract of title was filed in this case, and is filed in every case, and is carefully revised by the court before a decree is pronounced. The record shows (p. 13) that such report (or "abstract") was filed, but as a certified copy of it would be entirely immaterial to the issues in this case, cumbersome to the record, and absurd to print, it was omitted from the record.

His argument assumes that the court is not a court of justice, and that no provisions or proceedings are made by its judges to insure a judicial examination of title by the party most interested to see that no mistake shall be made, namely, the Commonwealth. He admits (p. 27) that "there are not so many adverse claims that cannot be ascertained, as it is sometimes assumed," and that "in an examination of title conducted on behalf of those whose interest it is that no mistake shall be made, it is rare that any possible adverse claim remains undiscovered," and that the experience of title insurance companies shows this. But he implies that no effort is made whatsoever to discover adverse claims, it being nobody's interest to do so.

The whole purpose of an official examination is to discover adverse claims. The examination is conducted by conveyancers appointed by the judge, who are precisely the same conveyancers who conduct examinations on behalf of those same title insurance companies. The examination is made under much better circumstances and much greater effort is expended to ascertain adverse claims than has ever before been possible.

(*b.*) The plaintiff in error states that the provisions for application *and notice* in the Massachusetts Act are similar to the provisions in the Ohio Act (pp. 7, 10, and 18 of his brief), and he quotes from the Ohio decision (State *vs.* Guilbert) "only those who are named in the application are required to be served, even in this manner."

This is not only not true, but, on the contrary, is the essential respect in which the Massachusetts Act differs from the Ohio Act. Under the Ohio Act only persons named by the applicant received notice, and they were notified, not by the court, but by the applicant himself; neither was there any judicial examination of the title. Under the Massachusetts Act official notice is served by the recorder of the court, not by a party; is served upon all parties who appear either from the applicant's statement or from the examiner's report or opinion to have any possible claim; the court may at any time order such further notice as it may deem proper, and the judges, by the terms of the amendment of 1900, are obliged to see that *actual notice* is given not only when practicable, but *when possible;* and the Massachusetts supreme court, whose decision on this point is final, in construing the Act has held that "the notice is required to name all persons known to have an adverse interest, and this, of course, includes any adverse claim, whether admitted or denied, that may have been *discovered by the examiner* or in any way found to exist" (p. 33 of the Record).

II.

The plaintiff argues (p. 9 *et seq.*) that a person interested in the proceedings for initial registration has the constitutional right to actual notice and an opportunity to be heard;

and that he cannot be constitutionally concluded by a decree in proceedings of which he has no actual notice. He says (p. 13) that it is recognized in unambiguous terms in Hagar *vs.* Reclamation District, 111 U. S., p. 708, and Iowa Central Railway Company *vs.* Iowa, 160 U. S., p. 393, that a right to *notice* and an opportunity to be heard are fundamental rights, secured by the requirement of due process, where life or liberty or the title of property is involved.

If what is here said is true, then the practice prevailing in Massachusetts of serving summons upon residents by leaving a copy at the last and usual place of abode is an unconstitutional method of service, unless the copy actually is received by the party to which it is directed. Nevertheless, it has always been considered good service, has been provided for by statute, and, as the court below said (Record, p. 37), "It (the summons) may be served on residents by leaving a copy at the last and usual place of abode."

If the plaintiff's point is well taken that notice must be received before a valid decree can be entered, then the decision of this court in Arndt *vs.* Griggs was put upon an entirely erroneous ground, because that case recognized the validity of notice by publication, whether or not the notice actually came home to the party interested. It will not do to attempt to distinguish this case, as the plaintiff does, by saying that non-residents may be concluded, whether they receive notice or not. If the receipt of actual notice before the entry of a conclusive decree is a fundamental right, then a non-resident is as much entitled to receive it as a resident, and the justification of the validity of service by publication should be, not that the person to be affected is a

non-resident, but that he cannot be actually notified. Usually, however, a non-resident can be actually notified, in the sense that he can be made to receive notice quite as effectually as a resident, but the validity of service upon him by publication does not depend upon the fact whether he can be actually notified or not.

The real fact is that the word "notice" is frequently used in two different senses. It may be used to express the fact that news of the proceedings is sent, or to express the fact that such news is received. It depends upon whether regard be had to the point of view of the person sending or to that of the person receiving the news. The plaintiff argues that the constitutional right to notice is the right to receive notice, but the cases all assume that this right to notice is a right to have such notice sent out as is likely to be received. For instance, Arndt *vs.* Griggs decides that for the purpose of determining the title of a non-resident to land within the State "The State may provide any reasonable methods of imparting notice." This plainly refers to the notice to be sent. If notice was required to be received, then there would not be any reasonable method of imparting notice, except one resulting in its actual receipt. To illustrate the way in which the plaintiff confuses these two meanings, we quote the following from his brief (p. 10):

> "To all persons adversely interested that do not receive actual notice of the proceedings, there is no process of law or notice whatever, except the advertisement in a newspaper addressed, 'To all whom it may concern.' The question is, in the first place, whether this is a sufficient process where the persons to be concluded by the decree are known and within the jurisdiction and can be actually served with notice."

This is merely saying that if notice means the receipt of news, there is no notice when the news is not received; but he fails to state that notice is given in the sense that news is sent out, not only by publication but by posting on the land and by registered mail. This is notice, whether it comes home to the party interested or not.

And it should further be noted, as above, that the amendment of 1900 provides for *actual* notice on both resident and non-resident when possible.

III.

The Illinois method of clearing titles is referred to by the plaintiff in error as indicating the way in which registration of title is practicable. This method is utterly inadequate. The Illinois act (Laws of 1897, p. 141) provides (section 28) that the decree of registration is not conclusive against persons entitled to future interests in land until the expiration of one year after those interests take effect in possession, which may be twenty-one years after any life in being. Until the expiration of that time, therefore, a certificate of title under the Illinois act is worth no more than the certificate of the examiner who examines a title.

IV.

Finally, it should be noted that although the plaintiff in error states (p. 23) that the amendments to the act are applicable to these proceedings, the copy of the act printed as an appendix to his brief is not, as it purports to be, a full copy of the provisions of the act.

See amendments omitted to sections 2, 3, 12, 13, 19, 27, and 58.

The copy printed as an appendix to the brief of the defendants in error is a full copy of the act as it exists today.

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